

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-7, SUB 1265

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	
Application of Duke Energy Carolinas, LLC,)	
For Approval of Demand-Side Management)	POST-HEARING BRIEF
And Energy Efficiency Cost Recovery Rider)	OF CIGFUR III
Pursuant to N.C.G.S. 62-133.9 and)	
Commission Rule R8-69)	

NOW COMES the Carolina Industrial Group for Fair Utility Rates III (CIGFUR III or CIGFUR), by and through the undersigned counsel, pursuant to the Commission's June 7, 2022 Notice of Due Date for Proposed Orders and/or Briefs and the Commission's July 15, 2022 Order Granting Extension of Time, and respectfully submits this post-hearing brief in the above-captioned docket.

On March 15, 2022, CIGFUR III filed a Petition to Intervene in the above-captioned docket. On March 16, 2022, the Commission granted CIGFUR III's petition to intervene.

During the hearing on June 7, 2022, the Commission raised questions regarding the statutory opt-out for industrial (and large commercial) to opt-out of participating in (and paying for, by way of the EE/DSM Rider) EE/DSM programs administered by DEC. The purpose of this post-hearing brief is to provide a succinct legislative and regulatory history of the EE/DSM opt-out, as well as to summarize some of the public policy reasons in support of such an opt-out and provide constructive feedback for changes DEC could made to its existing non-residential EE/DSM suite of programs that would, from CIGFUR's perspective, likely increase the amount of non-residential participation in EE/DSM programs (and thus, paying for the costs of such programs).

History of EE/DSM Opt-Out

1. Legislative History

The North Carolina General Assembly enacted G.S. 62-133.9 as part of the Renewable Energy and Energy Efficiency Portfolio Standard (REPS) legislation codified in 2007 by the enactment into law of Senate Bill 3 (S.L. 2007-397) (SB 3). As part of the section governing cost recovery for demand-side management and energy efficiency (DSM/EE) measures, a mandatory mechanism to allow industrial customers (and large commercial customers) to opt-out from participating in and paying for utility-administered DSM/EE programs:

any industrial customer that notifies the industrial customer's electric power supplier that, at the industrial customer's own expense, the industrial customer has implemented at any time in the past or, in accordance with stated, quantified goals for demand-side management and energy efficiency, will implement alternative demand-side management and energy efficiency measures and that the industrial customer elects not to participate in demand-side management or energy efficiency measures under this section.

G.S. 62-133.9(f).

In addition, the statute authorizes the industrial customer's electric power supplier, the Public Staff – North Carolina Utilities Commission (Public Staff), or the Commission, *sua sponte*, to “initiate a complaint proceeding before the Commission to challenge the validity of the notification of nonparticipation.” *Id.*

There are a host of public policy reasons supporting the DSM/EE opt-out, which our Legislature saw fit to codify in law, including but not necessarily limited to the following:

- (1) Large commercial and industrial customers are heavily economically incentivized to conserve energy to the greatest possible extent.
- (2) Large commercial and industrial customers tend to be more sensitive and responsive to price signals than are residential customers.

(3) Large commercial and industrial customers are economically incentivized to make their own investments in EE/DSM measures, **the costs for which are borne solely by the opted-out C&I customer and which are not then absorbed by all other ratepayers**, unlike EE/DSM measures undertaken for residential customers as part of utility-administered EE/DSM programs. In other words, CIGFUR contends it is an inaccurate framing of this issue to say that C&I customers are “avoiding a cost burden” by opting out of the EE/DSM Rider. Rather, in lieu of participating in and paying for the utility-administered EE/DSM programs, the opted-out C&I customers are instead making their own corporate investments in EE/DSM measures that they pay for at no cost to the utility (or, more accurately, the utility’s other ratepayers). Frankly, at a time when Duke Energy is contemplating a Carbon Plan the costs for which are significantly understated even at a projected \$100 billion estimated price tag, the public policy reasons for encouraging the maximum amount of non-utility corporate investment in the private sector **that does not have to then be recovered in electric rates** has never been more important.

Intervenors tending to represent environmental interests have not infrequently over the years sought to raise controversy surrounding the DSM/EE opt-out.¹ Indeed, the ink had hardly

¹ In its initial and reply comments, Duke argued that any customer choosing to opt out must be able to demonstrate to its electric power supplier that the alternative EE and DSM measures it has implemented or has definitive plans to implement at its own expense are substantially equivalent to those offered by the electric power supplier. Otherwise, according to Duke, such customers will be able to avoid paying their share of deferred generation costs without having made a comparable investment to that made by participating customers.

ED, SACE and SELC supported the concept embodied in Duke’s proposal. They further proposed that any customer electing to opt out be required to provide detailed descriptions of measures evaluated and measures implemented or planned, together with quantified results and projections.

dried after SB 3 was signed into law before a coordinated and sustained effort began to renege on the DSM/EE opt-out, which was a critically important element of the SB 3 compromise, without which SB 3 may never have been enacted into law.²

Wal-Mart, NUCOR, CUCA and CIGFUR opposed Duke's proposal. CIGFUR and CUCA further argued that ED, SACE and SELC's proposed detailed description requirement goes beyond the letter and intent of the statute, G.S. 62-133.9(f), which only requires notice to the supplier that programs have or will be implemented and that the customer elects to opt out. Further, the General Assembly adopted a complaint procedure as the method for challenging the validity of opt-out notices, and the proposal runs the risk of requiring the disclosure of company proprietary data.

In its supplemental filing, Progress stated that it agreed with CUCA and CIGFUR that Senate Bill 3 grants to industrial customers the right to opt out of all DSM and/or energy efficiency programs offered by their electric power supplier provided such industrial customers implement DSM and/or energy efficiency programs on their own. Senate Bill 3 does not have a requirement that such alternate DSM and/or energy efficiency programs be equivalent to those offered by the electric supplier.

The Commission concludes that Rule R8-69 should not be revised to include either Duke's proposal to require a 'substantially equivalent' test in order for customers to opt out of DSM and EE programs or ED, SACE and SELC's proposal that customers desiring to opt out be required to provide detailed descriptions of measures evaluated and measures implemented or planned together with quantified results and projects of the impact of the measures.

Order Adopting Final Rules, at pp. 128-29, Docket No. E-100, Sub 113 (Feb. 29, 2008).

² The passage of Senate Bill 3 was the culmination of a long and complicated process initiated by the sincere desire of many North Carolina Representatives and Senators to improve the environment, reduce pollution and increase the use of renewable resource generation in North Carolina. Many 'stakeholders' participated over several months in the Energy Issues Working Group (EIWG) convened by legislative staff pursuant to legislative direction. The purpose of the EIWG process was to come to agreements that would permit comprehensive energy legislation to come into being. Although there were separate meetings between legislators and individual stakeholders, all changes and compromise were discussed by the EIWG Group before the final substitute bill was submitted to the General Assembly.

Some of these stakeholders included: the utilities, the 'clean air' and/or environmental community, the renewable resources or 'green power' interests, at least two organized groups of advocates for large commercial and industrial interests, and other consumer advocates including the Public Staff and the Attorney General. Each of these 'stakeholder' groups advocated strongly-held, and usually conflicting, views on the central issues involved in Senate Bill 3.

...

The final version of Senate Bill 3, as enacted, represents both a compromise and a 'balancing of the equities' among the various competing

2. Regulatory History

In 2008, the Commission addressed the opt-out in its SB 3 Rulemaking Order, excerpted in pertinent part as follows:

The Commission concludes that Rule R8-69 should not be revised to include either Duke's proposal to require a 'substantially equivalent' test in order for customers to opt out of DSM and EE programs or ED, SACE, and SELC's proposal that customers desiring to opt out be required to provide detailed descriptions of measures evaluated and measures implemented or planned together with quantified results and projections of the impact of the measures. Senate Bill 3, in general, and G.S. 62-133.8(f), in particular, do not contain any requirement that DSM or EE programs implemented by the customer or DSM or EE programs proposed to be implemented by the customer must be substantially equivalent to the programs or measures being supplied by the electric power supplier. Nor does Senate Bill 3 require customers desiring to opt out to provide detailed descriptions of measures evaluated and measures implemented or planned together with quantified results and projections of the impact of the measures. **All that is required of a program used as the basis for a customer's decision to opt out is that: (1) the program has (sic) been implemented in the past or (2) that it be proposed to be implemented in the future in accordance with stated, qualified goals.**³

In 2009, the Commission again had the opportunity to evaluate the opt-out as the result of motions for reconsideration filed by various parties in response to the Commission entering an

interests described above. In the final version of the legislation as enacted, each of the stakeholder groups received some of the things that it wanted from the legislation while being required to undertake certain burdens, obligations and responsibilities that they would have preferred not to incur. The General Assembly was sensitive to the fact that it had 'struck a balance' between the various competing interests in the final version of Senate Bill 3 that was enacted.

The Commission's Orders, for which reconsideration is sought herein, tend to undermine the balance that was struck between the various competing interests that allowed the passage of Senate Bill 3.

Motion for Reconsideration of Carolina Utility Customers Association, Inc., Docket No. E-2, Subs 926 and 931, at pp. 9-11 (July 13, 2009).

³ Order Adopting Final Rules, at p. 129, Docket No. E-100, Sub 113 (Feb. 29, 2008) (emphasis added).

Order Approving Program in Docket No. E-2, Sub 926 and an Order Approving Agreement and Stipulation of Partial Settlement, Subject to Certain Commission-Required Modifications in Docket No. E-2, Sub 931. The practical effect of those orders, when interpreted and applied in tandem, would have been to effectively prohibit PEC's (now DEP's) industrial customers from opting out of all PEC-administered DSM/EE programs. PEC argued, among other things, that

the language of G.S. 62-133.9(f) plainly grants to industrial and large commercial customers the absolute right to opt out of any cost recovery responsibility for all of an electric power supplier's DSM and EE measures upon notifying the electric supplier that the customer has implemented or will implement DSM and EE measures of its own. The Commission may not limit or condition that right.⁴

On November 25, 2009, the Commission issued an Order Granting Motions for Reconsideration in Part, which addressed the DSM/EE opt-out issue. The Commission concluded as to the DSM/EE opt-out issue that

PEC's interpretation of the opt-out provision contained in G.S. 62-133.9(f) is correct for the reasons generally set forth above in the description of the Company's legal analysis. G.S. 62-133.9(f) is unambiguous on this point. The statute says that **none** of the costs of new DSM or EE measures shall be assigned to **any** industrial customer that notifies its electric power supplier that it has in the past or will, at its own expense, implement **alternative** DSM or EE measures and that it elects not to participate in any of the electric power supplier's DSM and EE measures. The words 'none' and 'any' are unambiguous and permit no exceptions. It is impossible to imply exceptions for programs to which the industrial and large commercial customers cannot opt into or out of, for which the customers receive a benefit, or that arise from electric power supplier operations on the supplier's side of the meter. As was correctly stated and asserted by the Public Staff and other petitioning parties, G.S. 62-133.9(f) compels and supports no other interpretation than the one advanced by the various motions for reconsideration.⁵

⁴ Order Granting Motions for Reconsideration in Part, at p. 5, Docket No. E-2, Subs 926 and 931 (Nov. 25, 2009).

⁵ *Id.* at 6 (emphasis in original) (internal citations omitted).

DEC witness Listebarger described the opt-out process in her testimony, which is consistent with the Commission's Order Granting Waiver, in Part, and Denying Waiver, in Part issued April 6, 2010, in Docket No. E-7, Subs 938 and 1032. Tr. at 11.

Despite repeated attempts by intervenors representing environmental interests to continue disputing what CIGFUR contends to be a matter of settled law, the Commission has time and again rejected such arguments by environmental advocates. For example, the Commission found as follows when it completed a formal review of Duke's DSM/EE mechanism in October 2020:

With regard to the Joint Commenters' recommendation that the Commission institute a reporting requirement for opt-out customers, the Commission agrees with the Public Staff that consideration of an opt-out reporting requirement is beyond the scope of this proceeding. The opt-out provision is a factor in determinations by industrial and large commercial customers about whether to participate in the utilities' DSM/EE programs. But it has little or nothing to do with the guidelines by which the utilities recover their DSM/EE costs and the incentives they receive for successfully operating such programs. **Further, the Commission is not persuaded that there is any basis for reviewing or modifying its decision in the SB 3 Rules Order declining to adopt a reporting requirement.**⁶

Discussion

During the hearing in the above-captioned matter, the Commission asked questions regarding the EE/DSM opt-out.⁷ First, and most importantly, CIGFUR supports DSM/EE measures—both those taken as part of utility-administered programs and those funded through corporate and other non-utility (rather, their ratepayers) private sector investment—and emphasizes the critical importance of energy conservation and efficiency, as well as price-responsiveness and demand response for non-residential customers with flexible load,

⁶ Order Approving Revisions to Demand-Side Management and Energy Efficiency Cost Recovery Mechanisms, at p. 13, Docket Nos. E-2, Sub 931; E-7, Sub 1032 (Oct. 20, 2020) (emphasis added).

⁷ Tr., at 123-26.

in C&I operations. As noted multiple times in CIGFUR’s Carbon Plan comments,⁸ CIGFUR encourages Duke to leverage non-residential DSM/EE to the greatest possible extent in its effort to “shrink the challenge” as part of Carbon Plan implementation.

Second, CIGFUR respectfully reminds the Commission that policy issues related to the DSM/EE opt-out—and more specifically, the criteria for a C&I customers to qualify for such opt-out and the myriad reasons why a “reporting” requirement as some intervenors continue to advocate for would be inappropriate, infeasible, and inconsistent with both the provisions of SB 3 and Commission precedent—have already come before this Commission before, at various times since the enactment of SB 3 and through multiple different proceedings.

Finally, as elicited on cross-examination,⁹ CIGFUR reiterates that it has, for over a year, provided constructive feedback to Duke—both privately and as part of various stakeholder processes—regarding both new DSM programs for non-residential customers and modifications to Duke’s existing DSM programs that, if implemented by Duke, would likely enable greater EE/DSM program participation by C&I customers, including but not limited to some CIGFUR member companies with flexible load. As elicited on cross-examination,¹⁰ Duke has not, to date, created the new DSM programs requested or otherwise modified its existing DSM programs consistent with CIGFUR’s feedback. However, CIGFUR continues to engage constructively with Duke regarding these requested non-residential DSM/demand response programs and hopes that Duke will seek to implement them as soon as possible.

⁸ See, e.g., Comments of CIGFUR II and III, at pp. 14, 15, 16, 26, 27, 39, and 41; Attachment O; Attachment P; and Attachment Q, Docket No. E-100, Sub 179 (July 15, 2022).

⁹ Tr., at 160-65.

¹⁰ *Id.*

1. In the absence of some future statutory amendment, the DSM/EE opt-out is settled law.

As the Commission has previously found in its decisions, North Carolina law is clear: absent some future statute change, industrial customers must be allowed to opt-out of participating in and paying for DSM/EE programs if they have

implemented at any time in the past or, in accordance with stated, quantified goals for demand-side management and energy efficiency, will implement alternative demand-side management and energy efficiency measures and that the industrial customer elects not to participate in demand-side management or energy efficiency measures under this section.

G.S. 62-133.9(f).

In addition, the Commission has previously considered and decided issues related to an industrial customer's burden of proof when demonstrating that it is eligible to opt-out of participating in utility-administered DSM/EE programs. In its November 25, 2009 Order, the Commission decided that an industrial customer "only needs to promise to implement now or in the future alternative measures [to qualify for the DSM/EE opt-out]." ¹¹ Indeed, the proper mechanism to challenge or enforce this showing is not through any sort of reporting requirement, as some advocates contend, but rather through the complaint process at the initiation of an opt-out, as is specifically provided for in the statute. ¹²

2. Industrial customers must perform their own energy saving processes, at their own cost, to qualify for the EE/DSM opt-out.

As stated by DEC witness Powers, an industrial customer must "self-certify that they are undertaking energy efficiency measures of their own" in order to qualify for the DSM/EE opt-

¹¹ Order Approving Revisions to Demand-Side Management and Energy Efficiency Cost Recovery Mechanisms, at p. 13, Docket Nos. E-2, Sub 931; E-7, Sub 1032 (Oct. 20, 2020) (emphasis added).

¹² G.S. 62-133.9(f) specifically contemplates and authorizes the industrial customer's electric power supplier, the Public Staff – North Carolina Utilities Commission (Public Staff), or the Commission, *sua sponte*, to "initiate a complaint proceeding before the Commission to challenge the validity of the notification of nonparticipation." It does not, however, contemplate or authorize any sort of continuous reporting or record/physical inspection requirement.

out.¹³ Further, DEC witness Powers noted industrial customers who opt out of participating and paying for DEC's DSM/EE programs incur all their own related costs to implement DSM/EE measures, which are not "subsidized by [other] customers [of DEC]."¹⁴

The primary public policy reason behind the statute allowing industrial customers to opt out of DSM/EE programs is that industrial customers are highly economically motivated to conserve energy and, where an industrial customer's load is flexible, respond to price signals and reduce load accordingly. As DEC witness Powers stated: "for [industrial customers]... energy conservation... is a competitive advantage... they are intrinsically motivated to drive their energy costs down as low they can get them."¹⁵

WHEREFORE, CIGFUR III respectfully requests the Commission consider the issues of law and policy raised in this Post-Hearing Brief.

Respectfully submitted, this the 27th day of July, 2022.

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¹³ Tr., at 126.

¹⁴ *Id.*

¹⁵ *Id.* at 127.

CERTIFICATE OF SERVICE

The undersigned attorney for CIGFUR III hereby certifies that she caused the foregoing *Post-Hearing Brief of CIGFUR III* to be served this day upon counsel of record for all parties to this docket by electronic mail.

This the 27th day of July, 2022.

/s/ Christina D. Cress
Christina D. Cress

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